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Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

Respondents.

BRIEF FOR RESPONDENT MALONE.

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BRIEF FOR RESPONDENT MALONE.

PROCEDURAL HISTORY OF CASE.

This action is before this Court on Certiorari, for review of the decision of the Circuit Court of Appeals of the Eighth Circuit Court [103 Federal Reporter (2nd), 450], which affirmed the judgment of the United States District Court, District of Minnesota, entered June 14, 1939, dismissing plaintiff's complaint [23 Federal Supplement 411]. (101-115; 68-91)*

*NOTE: In this brief for purposes of convenience Petitioner will be referred to as plaintiff and Respondents will be referred to as defendants. Unless otherwise indicated, the figures in the parentheses refer to pages of the printed record.

This action was commenced by plaintiff, Midland Loan Finance Company, in the name of the United States, to recover consequential damages against the principal and surety on an acting postmaster's bond (3-24). Both defendants interposed Demurrers to the complaint, which were overruled (25-30). Both defendants interposed Answers, which Answers, together with amendments at trial, among other things challenged the right of plaintiff to maintain this action on the bond (30-34). At the trial, after plaintiff's opening statement, again at the close of plaintiff's testimony, and finally at the close of all testimony, motions to dismiss were made by defendants on the grounds, among others, that plaintiff had no right to sue on this bond, and that there was no evidence of consent of the United States authorizing such suit (61, 67, 75-77). The Court granted the motion of defendant Surety Company to dismiss, on the grounds that the United States was the sole party in interest entitled to sue or recover on the bond, and that plaintiff, not having obtained the Government's consent to do so, could not maintain this action in the name of the United States (102). The Court likewise dismissed the action against defendant Malone, the principal on the bond, since in the absence of the surety as a party the requisite diversity of citizenship to confer jurisdiction was lacking (88).

The motions to dismiss were made at the close of the testimony and before verdict, the Court reserving its ruling thereon until after verdict. This procedure was consented to by counsel for all parties (70).

Though the Trial Court's decision was made after verdict, it must be considered to have been made at the time

of the motions, that is *nunc pro tunc*. Thus, the verdict, or its effect, is not before this Court on this appeal.

STATEMENT OF FACTS.

Facts Stated by Circuit Court of Appeals.

The statement of facts set forth by the Circuit Court of Appeals is correct, and incorporated herein by reference (102-103).

Plaintiff criticizes the statement of that Court that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," and claims that the same should be qualified by stating that the testimony did not directly "establish that Malone was knowingly a party to the fraud."

The language of the Circuit Court of Appeals in this respect is as follows:

> "It is not claimed that any of the lost funds came into the posession of the acting postmaster, or that he had any knowledge of the fraud that was being perpetrated by Hunting." (103).

The record indicates this statement of the Circuit Court of Appeals is correct.

The opinion, in part, of Judge Nordbye, reads as follows:

> "The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to

be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff." (72)

Thus Judge Nordbye, the trial judge, states the evidence did not directly establish Malone was knowingly a party to the fraud. His opinion does not state, as counsel would intimate, that the circumstantial evidence indicated that Malone did know of the fraud. In his opening statement, at the trial, when challenged by defendant to state whether it was plaintiff's claim that Malone was guilty of corruption, plaintiff's counsel attempted to evade the question by claiming that he did not understand what was meant by the word "corruption", and declined to so charge Malone, and in his opening to the jury stated it was immaterial (46-47).

Plaintiff conceded, in the oral argument to the Circuit Court of Appeals, that the appeal did not involve tort liability on the part of Malone. Therefore, the statement of the Circuit Court of Appeals to the effect, "It is not claimed that he (the postmaster), had any knowledge of the fraud being perpetrated by Hunting," is correct in view of the complaint, the statements of counsel for petitioner, and the statement of Judge Nordbye.

The Bond.

In addition to the language set forth on Page 6 of plaintiff's Brief, it is to be noted that the bond reads:

"That * * * Malone * * * do bind ourselves * * * *to pay to the United States of America the*

sum of Sixteen Thousand Dollars * * *." (103) (Italics supplied)

Bond Statutes Involved.

Under the title "Bond Statutes Involved" (page 6 plaintiff's Brief) three statutes, are cited, namely, 39 U. S. C. A. Sec. 34; 5 U. S. C. A. Sec. 377 and 39 U. S. C. A. Sec. 815. Citation of the following statute is omitted, which is so significant that it was cited by the Circuit Court of Appeals in its opinion, as follows:

> "All suits * * * arising under the postal laws shall be brought in the name of the United States * * * 28 U. S. C. A. Sec. 732." (104)

Also omitted, are other statutes pertaining to this bond, unfavorable to plaintiff, which were of such significance that they were cited by the Trial Court (75-76). The statutes so omitted are:

> "Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General."
>
> "Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, *if the Postmaster General* or the Comptroller General *deem it just*, be applied first *to discharge any balance* which may be due from such postmaster under his old bond."
>
> "Section 37. Deficiency in accounts; notice to sureties. When a *deficiency shall be discovered*, in the accounts of any postmaster, who after the adjustment

of his accounts fails to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond."

"Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change: and every postmaster and his sureties shall be responsible under their bond *for the safekeeping of the public property of the postoffice*, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, *the sureties may terminate their responsibility by giving notice*, in writing, *to the Postmaster General, such termination to take effect ten days after sufficient* time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease."

"Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear *that he is indebted to the United States,* and suit therefor shall not be instituted within *three years* after the close of such account, *the sureties on his* bond shall not be liable for *such indebtedness.*"

"Section 44. Neglect to render accounts. Whenever any postmaster *neglects* to *render his accounts* for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, *he and his sureties shall forfeit* and pay *double the amount of the gross receipts at such office* during any previous or subsequent equal period of time; and, if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond." (Italics supplied)

Other pertinent Statutes are:

5 USCA, Sec. 22: "Departmental Regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"5 USCA, Sec. 392: Adjustment and Settlement of certain claims for damages to person or property by Postmaster General. When any damage is done to person or property by or through the operation of the Post Office Department in any branch of its service, and such damage is found by the Postmaster General upon investigation to be a proper charge against the United States, the Postmaster General is invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not

exceed five hundred dollars, and this authority shall hereafter be construed as extending to cases caused by the negligence of any office or employee of the Post Office Department or Postal Service acting within the scope of his employment. (As amended June 22, 1934, c. 717, 48 Stat. 1207)."

39 USCA, Sec. 790: "Delivery of stolen money to owner. Whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him."

Postal Regulations Involved.

Under the heading of "Departmental Regulations Involved," plaintiff cites certain Postal Regulations.

In view of this fact, and because peculiarly connected with the question involved, this defendant deems it necessary to set forth a quotation from the opinion of the Circuit Court of Appeals as follows:

"The Postal Laws and Regulations, Edition of 1932, provide:

"Section 777. 1. Mail Matter should be delivered to the person addressed or in accordance with his written order.

"2. **When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.** (Bold face type supplied.)

Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible

therefor by the Chief Inspector by proceedings in the department, and that,

27. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear" (104).

Without explanation or comment, plaintiff omits (p. 10, Plaintiff's Brief) all reference to paragraph 2 of Section 777 of the Postal Regulations, which is unfavorable to plaintiff. The significance of this omission is at once apparent when reference is had to its attempted explanation of the meaning of this portion of the Regulation (p. 62, Plaintiff's Brief). This question is not before this Court on this appeal, but it goes to the very heart of the merits of the controversy between the parties. In sustaining its claim that Malone was guilty of intentional misdelivery of the mail, it was necessary for plaintiff to ignore the purport of the paragraph, and it is obvious this was the reason for omitting all reference to this paragraph of Sec. 777.

That such is plaintiff's purpose is more apparent when it argues (p. 62, Plaintiff's Brief) that said paragraph 2 grants no discretion to the postmaster. The language, "a person * * * claiming the addressee has verbally given him authority to receive it, *the postmaster, if he doubts the authority* * * *", indicates that the postmaster must exercise judgment in order to determine delivery thereunder. Action of that nature by the postmaster is discretionary. The delivery of the mail involved in this action was made in accordance with this paragraph of Sec. 777, and the action of Malone in so doing was perfectly proper and justifiable under the circumstances (72; 104).

So, it is apparent that whenever embarrasing to his contention plaintiff's counsel omits all reference to this paragraph of Sec. 777, although he had that section very definitely in mind when writing his brief (10; 36; 71-63, 65).

Government's Attitude Towards This Action.

The record indicates that petitioner sought permission from the United States to sue on the bond in the name of the United States, but this permission was denied by the Attorney General and no consent to this suit was ever given by the United States (57-60).

On page 11 of his brief, plaintiff's counsel quotes from a letter of the Attorney General. From this quotation it is apparent that in stating the matter to the Attorney General plaintiff's counsel claimed the right of action referred to was the "exclusive property" of his client. There is no showing what plaintiff's counsel stated to the Attorney General on the occasion of the conference referred to in this letter, and hence it cannot be concluded from the quoted excerpt that the Attorney General, when writing as he did, was considering the same factual situation as was presented to the trial and appellate courts and by them determined adversely to plaintiff. In fact, when the Attorney General wrote as he did, "a claim of the nature stated by you is a *question of law*," he thereby indicated he had no disposition to rule, and was not ruling, on the legal question here involved, except that his letter amounted to an explicit refusal of the United States to consent to the use of its name in this case or the bringing of this action (59).

To attempt to construe the purport of this letter from the Attorney General as plaintiff has done amounts to a refutation of the clear language of the statute (28 U. S. C. A., Sec. 732), which states:

> "All suits * * * arising under the postal laws, shall be brought *in the name of the United States.*" (Italics supplied)

The language "brought in the name of the United States" demands not only that suit be brought *in the name of the United States,* but that consent to the use of its name be obtained. If suit in its name can be brought without the consent of the United States, it means the Government has no control over the use of its name and the italicised words in the above quoted statute become meaningless. Surely the Congress, in using the language it did in the above quoted statute, had a clear purpose in mind; that purpose being that consent to the use of the name of the United States in any suit arising under the postal laws must be obtained and unless so obtained suit in its name could not be instituted or maintained. *Cf.* United States v. United States Line, 24 Fed. Supp. 427.

Nature of Action Involved.

The action is one on a contract, namely, on an acting postmaster's bond. It is not one in tort, or sounding in tort.

The Circuit Court of Appeals so states in the following language:

> "It will be observed that this *is not an action against a postmaster sounding in tort* * * * It is an ac-

tion on a bond by a stranger to the contract brought without the consent of the obligee." (Italics supplied)

Further the opinion of Judge Nordbye so indicates:

"*The action was brought* by the plaintiff, Midland Loan Finance Company, in the name of the United States, as above indicated, *to recover* damages against the principal and surety on a postmaster's bond * * * The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the *plaintiff limited its right to recover against both defendants to the amount of the bond*" (70). (Italics supplied)

Plaintiff in open Court, as above stated by Judge Nordbye, limited its amount of claim against Malone to the amount of the bond, that is Sixteen Thousand Dollars, (63).

The action, both in the lower Court and the Circuit Court of Appeals, was tried on the theory that this was an action on a contract; the bond in question, and not one sounding in tort as suggested by plaintiff. It is elementary law that plaintiff after trial and appeal cannot shift or change his theory of liability and urge a new theory not before suggested.

At page 3 of Plaintiff's Brief, it is stated that the action is "to recover *loss sustained* by plaintiff through the postmaster's tortious diversion of numerous business letters etc. * * *"

The nature of this loss is important. Plaintiff's loss and the damages sought to be recovered were consequential damages and should be so characterized. This action was not commenced to recover the value of the letters sent, but

to recover the loss sustained by plaintiff because of forgery and other criminal acts perpetrated by one Hunting. (fol. 48). The Circuit Court of Appeals so characterized the damage claimed by plaintiff (102).

Ultimate Question Presented.

The ultimate question here presented is accurately stated by the Circuit Court, as follows:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?" (102).

The two questions suggested by plaintiff at page 3 of its Brief are necessarily included in the statement and determination of the question stated by the Circuit Court.

ARGUMENT.

I.

Plaintiff Has No Right to Sue on this Bond, in the Absence of Such Right to Sue Being Conferred by Statute, Either Expressly or by Necessary Legal Implication.

A. At Common Law, Plaintiff, as a Stranger to the Contract, Would Have No Right to Sue on this Bond.

From time immemorial, it has been a cardinal principle of the law of contracts that no person may sue on a contract unless he is a party thereto or has an interest therein, although he may be affected by it performance or failure. This basic rule has been adopted by this Court and is tersely stated in the case of German-Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 223, as follows:

> "A third person cannot sue for breach of contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest."

Also see:

Fosmire v. Nat. Surety Co., 229 N. Y. 44, 127 N. E. 472;

Robins Dry Dock etc. Co. v. Flint et al., 275 U. S. 303;

Washington v. Young, 10 Wheat. 406.

Therefore, if it be assumed that the statutes do not expressly or by implication create a right to sue in plaintiff, no consent to sue having been given by the government, plaintiff then has no right to maintain this action on the bond contract involved, being a stranger thereto.

B. The Language of the Bond Statute and Related Statutes Do Not Expressly Confer a Right in Plaintiff to Sue on this Bond.

The pertinent language of the statute reads as follows:

> 39 U. S. C. A. Sec. 34: "Every postmaster * * * shall give bond * * * *conditioned for the faithful discharge of all duties and trusts imposed on him, either by law or rules and regulations of the Department.*" (Italics supplied)

Inspection of this language indicates that no expressed right to sue is given plaintiff or any private person.

Nor is a right to sue expressly conferred by the language of any other statute or postal regulation. The Circuit Court so stated:

> "If it be assumed that the postmaster breached his bond by failure to compel Hunting to file with him written order of addressee, before delivering letters, in accordance with provisions of Sec. 777 of the Postal Regulations, it does not follow appellant is entitled to maintain the action. *No Federal Statute authorized such procedure.*" (104).

This was likewise the observation of the Trial Court, which said:

> "Other statutes which have a bearing on postmaster's bonds will be found in the footnote. *There is no provision or intimation in the statute that the patrons of a post office are to be given protection by the bond to be furnished.*" (Italics supplied)

It is obvious plaintiff has no right to maintain this action on this bond because of any expressed authorization by Congress.

C. The Language of the Bond Confers No Right in Plaintiff to Sue Thereon.

The pertinent language of the bond involved reads as follows:

> "* * * We, Patrick J. Malone, * * * bind ourselves * * * to pay *to the United States* of America the sum of Sixteen Thousand Dollars * * * The condition of this obligation is, if the said Patrick J. Malone shall * * * *faithfully discharge all the duties and trusts imposed on him as acting Postmaster either by law or by regulations of the Postal Department, and shall perform all duties as fiscal agent of the Government imposed upon him by law, or by the regulations of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon and required of him, by law or by regulations made pursuant to law, in connection with the postal system, then this obligation shall be void.*" (Italics supplied)

Inspection of the language of the bond indicates no express language is employed conferring upon plaintiff, or any other postal patron, a right to sue thereon. There is no suggestion or intimation from the language employed from which one, by implication, could conclude that such right was conferred or was within the contemplation of the parties at the time of its execution. The language employed requires the contrary conclusion that is, postal patrons, such as plaintiff, have no direct interest therein or any right to sue thereon. The correctness of this conclusion is manifest from an application of the rule of "ejusdem generis." The condition of the bond, first, requires performance of duties general in nature; then it refers to par-

ticular duties, which are duties pertaining and relating to the Government. Nowhere is language employed indicating coverage of anyone other than the Government.

Consequently applying the rule of "ejusdem generis", that is, that the general is to be governed by the specific, the only conclusion deducible from this language is that the parties, when executing the bond, contemplated and intended that no one but the Government should be within its coverage and protection.

D. The language of the bond statute, and related statutes, do not by necessary implication or legal intendment confer on plaintiff or any other private person a right to sue on this bond.

In the determination of this inquiry, attention must first be directed to the language of the statutes. Practical construction in ascertaining the meaning and intent of any statute so requires. If recourse is not had to the language itself, and the meaning of the statute is to be ascertained from outside factors alone, the construction adopted might well defeat the manifest intention of the statute and the purpose for which it was passed. Therefore, the self-evident rule that, when the meaning and intention of the statue is clear from the language itself that construction must be adopted.

The language here does not intimate, or even suggest, an intention or meaning that plaintiff or any other private person has any right or interest in such a bond. The language employed suggests, and only suggests, that a bond is required of a postmaster to insure faithful performance of the duties imposed on him by law and the regulations. It does not suggest, or in any way intimate, that

these "duties and trusts" imposed are owing to private persons. That the manifest intent is that they are duties owing to the Government rather than private persons, is immediately suggested by necessary implication when reference is had to other related bond statutes, and in particular to the following:

> "All bonds taken and contracts entered into by the post office department shall be made to and with the United States of America. (5 U. S. C. A. 377)
> All suits * * * arising under the postal laws shall be brought in the name of the United States. 28 U. S. C. A. 732"

The statute first above quoted states that the bond and contract shall be *made to and with* the United States of America. It does not merely direct that the bond shall be made payable *to* the United States. In addition, it expressly directs that it shall be made "with the United States." Obviously, the language "with the United States," unless considered mere surplusage, indicates that Congress intended by the statute to do more than specify to whom the bond is payable. This language indicates that Congress intended that not only is the bond to be payable to the United States, but the contract itself is one between the United States and the principal and sureties of the bond. In other words, it thereby expressly designates who the parties to the contract are, and by that language excludes private persons such as plaintiff therefrom. The expression of this intention on the part of Congress indicates the duties of the postmaster covered by the bond are duties to the Government, not private persons.

Later discussion will be had showing that all the duties of a postmaster are duties he owes to the Government rather than mail users.

Likewise inspection of all related statutes indicates that there is no suggestion from their language that a right is conferred to private mail users to sue on the bond. In fact the only sensible conclusion to be drawn from their inspection is to the contrary.

The Trial Court correctly so concluded in the following language:

> *"An examination of the statutes dispels any serious doubt as to the intention of Congress. It is apparent that the dominant purpose of this bond is to protect the Government. Certainly, if there are no statutory provisions which even suggest an intent to cover private losses, such absence must be accorded great weight in determining the intendment of Congress."*

The pertinent portion of Section 34, Tit. 39 U. S. C. A., which provides for a postmaster's bond, reads as follows:

"34. Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

Section 377, Tit. 5 U. S. C. A. provides:

"377. Form of bonds and contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

Other statutes which have a bearing upon postmasters' bonds will be found in the footnote.

"(fol. 96) *There is no provision nor intimation in the statute that the patrons of a postoffice are to be given protection by the bond to be furnished.* No assurance is given to the public that it may do business with the postal system and have recourse to the postmaster's bond. Section 36 would indicate that in the accounting the Government's loss alone was being considered in the bond protection. Further, it will be observed that in Section 37 the Government makes provision for the notice that must be given by it to the sureties of any deficiency as disclosed in the accounts of any postmaster. Nothing is said about the notice that should be given in the event any patron claims loss by reason of the postmaster's neglect. Section 38 pertains to the period of liability on a postmaster's bond and prescribes the method by which the sureties may terminate their responsibility in case there is a vacancy in the office of postmaster and delay in filling it. This section would indicate (fol. 97) that, although a postmaster's office is vacant, the sureties are not released and are responsible, for the safe-keeping of the public property of the post office and the due performance of the duties thereof. That the primary purpose of the bond is to insure the inviolability of government property is emphasized by this section. No reference is made therein to any obligation to third parties, or the circumstances under which sureties might be absolved of responsibility to them. Section 40 prescribes a three-year statute of limitations on the sureties' liability where suit shall not have been initiated within three years after the close of an account indicating liability of a postmaster to the United States. Section 44 provides that the sureties shall forfeit and pay double the amount of the gross receipts in the event the postmaster neglects to render his accounts (f 98) for one month after the time that they shall be due. Again, it may be pointed out that this provision, in

prescribing an arbitrary penalty, would seem to negative any intention that anyone but the Government shall be entitled to protection. The statutes may be searched in vain for even the sligitest suggestion that an intendment exists to protect the public against loss." (74-77). (Italics supplied)

Also the Circuit Court correctly so held in the following language (page 452):

"We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection. *It is reasonable to presume that Congress intended primarily to protect that interest in enacting the statute requiring postmasters to give bond. The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private users.*" (Italics supplied)

Being unable to find any legal intendment to sue, the Circuit Court properly held that the principles followed in the case of Washington v. Young, 10 Wheat. 406, governed. There Chief Justice Marshall stated the rule in the following language:

"No person who is not the obligee of a bond, or its assignee, can put it in suit unless authorized to do so by the Legislature. It is not enough that a breach of the bond has damnified the person who brings the suit."

and further states:

> *"No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature, and no person can be authorized to use the name of another, without the assent given in fact, or by legal intendment."* (Italics supplied)

The Howard Case Considered and Analyzed.

Before discussing the *Howard case,* plaintiff states that the Circuit Court confused the question of substantive and remedial rights. Instead of the Circuit Court confusing substantive and remedial rights, plaintiff has confused them.

As heretofore argued the Circuit Court, as well as the District Court, held the statute conferred no right expressly or by implication on private persons to sue on this bond. That is neither confusing or mystical. Yet it is with that suggestion that plaintiff would like this Court to approach its analysis of the *Howard case.* He suggests the analysis should turn on the single question: "Does a postmaster stand in a relationship toward private mail users that is akin to the relationship of Clerks of District Courts towards private suitors?"

At the outset, it must be conceded that the *Howard case* did not determine the right of private mail users to sue on postmaster's bonds. Nor is the decision authority for the proposition that the postmaster's bond statute conferred such right by necessary legal implication. Because the bond statutes relating to Clerks of Federal Court by implication create such a right, does not permit the conclu-

sion that the same implication or legal intendment arises from the statute relating to postmaster's bonds. The logic of these conclusions is especially true, since the statute construed in the *Howard case* contains other or different language than the Postmaster's Bond statute in this case.

Since the Court, in the *Howard case*, from the language of the statute there construed found a right to sue on the bond was conferred by necessary implication and legal intendment, if that case is to be a help here the question presented must be solved by reference to the postmaster bond statute for in that way only can we determine whether a right to sue has been conferred on plaintiff by necessary implication and legal intendment. This is the question to be determined, rather than a determination of the question of whether the relationship of a postmaster and clerk of court to private persons is similar.

It is elementary that any cause of action vested in any particular person or persons must arise by virtue of common law or by statute. As heretofore seen, because of the elementary rule of contracts no right at common law is conferred on plaintiff to maintain this action. This also is true of the *Howard case*. Likewise in this case, as in the *Howard case*, no statute expressly conferred such right.

In the *Howard case*, however, because of the language of the statute, the Court concluded that by necessary implication and legal intendment such right to sue was conferred on a private person. Here, too, our inquiry of necessity must be directed to whether or not the bond statute of the postmaster, in like manner, creates such right to sue. Similarity of relationship or other similar fact in the cases cannot be held to create a right that could only arise by

virtue of common law, or by virtue of a statute. So in our analysis of the *Howard case* our purpose will be to employ this method of approach rather than the one plaintiff suggests, in order to determine whether it is distinguishable from the case at bar.

The bond statute in the *Howard case* reads as follows:

> "Sec. 795. The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, *faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk;* and a new bond may be required whenever *the court* deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safekeeping as *the court* may direct. A certified copy of such entry shall be prima facie proof of the execution of such bond and of the contents thereof." (Italics supplied)

The italicized words, "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the Court in which he is clerk" clearly and necessarily in and by itself suggests and requires the conclusion that the right to sue is conferred, and the coverage of the bond extended to private suitors as well as the Government.

Decrees, judgments and determinations of the Court of necessity must refer to private cases as well as those instituted by the Government. The statute, therefore, by the very language employed, gives rise to the necessary implication that private judgments, as well as Government judgments, are within the coverage of the bond.

That this is the underlying principal productive of the result in the *Howard case* that a right was conferred on private persons to sue by legal intendment, is obvious. This Court's language quoted by the lower Court in its decision in this case so indicates. The language of the postal statute contains no such suggestion and allows no such implication.

See:

US. A. for the Use and Benefit of Midland Loan Finance Company vs. National Surety Corporation, 23 Fed. 411.

"Plaintiff relies upon Howard v. United States, supra (184 U. S. 676), *but the distinction* between the facts of that case and the instant situation is *reasonably clear. The statute governing clerks* of United States courts, which office was being considered by the court, required the clerk to give a bond to the United States conditioned, *'faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court.' The decrees, judgments, etc., obviously referred to proceedings in private cases, as well as the entry of these orders in litigation instituted by the Government. Congress evidently intended that a clerk's failure timely to enter or satisfy judgments in behalf of private suitors, for instance, would constitute a breach of the bond.* The dominant purpose of the statute was not to protect the Government alone. *Private litigants stood on an equal footing with the Government.* There is *no provision in any of the* (fol. 100) *statutes pertaining to a postmaster's bond which conditions the bond upon the postmaster's performance of any specified or direct duty to the public.* The court placed *particular emphasis upon the language of the statute* providing for *the bond* that should be given *by the clerk*, and *it is clear that it determined that, by reason of this lan-*

guage, Congress intended to afford coverage to the public where it had been damnified by the clerk's breach of duty." (Italics supplied)

In discussing the liability of the clerk's bondsmen to private litigants, the court in the *Howard case* stated (p. 687):

"But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government; and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. *It is impossible to suppose that, when requiring a clerk to give bond to the United States 'faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court,' Congress had in mind the interests of the United States alone; and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be inconsistent with the practice of a century,* and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass (fol. 101) of litigation in the District

and Circuit Courts of the United States has always been between individuals, *and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States.* In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments, and determinations of the court. It must have been so understood when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute.

That there were more private than public litigants doing business with the office of clerk of court was especially true when the statute referred to in the Howard case was adopted. Private litigants directly depend upon the clerk of court faithfully to discharge the duties of his office. *He owes a direct duty under the statute to private litigants.* Large sums of money belonging to private suitors are often paid to the clerk. Such moneys are not paid to the Government as such. *Private suitors rely upon the clerk 'seasonably to record the decrees, judgments, and determinations of the court.' The use of this language must imply an intention on the part of Congress to permit a private claimant*, who has been damaged by the clerk's malfeasance, *direct recourse against the bond.*" (78-79) (Italics supplied)

After determining that the language of the statute standings alone conferred no right to sue on the bond of the Clerk of Court, this Court, as the language above indicates, suggested other facts and factors bearing on such intent, and referred to them in the opinion, such as the "peculiar rela-

tion" of the clerk to the public, etc. It was these factors, that amplified the language of the statute itself to the point where the right to sue was recognized. That situation is not this case.

The Letter of the Bond Statute Negatives a Right to Sue in Plaintiff.

At page 28 plaintiff contends the letter of the law confers benefits on mail users. It, then, concludes these benefits create an interest and right to sue on the acting postmaster's bond.

The trial court adequately answers this contention in the following language:

> "It is urged that, in that Section 34 requires a bond to be conditioned for the postmaster's 'faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department,' such clause is sufficient to include the duties and trusts that a postmaster should fulfill in carrying out the obligation that he owes to the public. But, in this connection, it must be recognized that this provision does not create any scope of coverage (fol. 99) inconsistent with the defendant surety company's position that it is limited to the named obligee. Obviously, there was no duty on the part of Congress to extend the coverage to the public. If it intended that the protection be limited to the named obligee, the quoted language from the statute would be the usual and customary covenants to be incorporated in the bond. The Court does not understand that a third party has the right to sue on an official bond merely because such right has not been specifically excluded. The burden nevertheless rests upon the plaintiff to establish that

such right is expressly given or necessarily implied." (77)

In this connection, plaintiff places great stress on the use of the word "all" in the postmaster's bond statute. It assumes since the word "all" is used, it must refer to those statutes and regulations that impose certain duties on the postmaster relative to the handling and delivery of mail. It further assumes, because mail patrons get some indirect benefit, this necessarily shows an intention by Congress to confer a right to sue on the bond. Surely, the word "all" in and by itself connotes no such suggestion or inference. That such indirect benefits cannot create a right was well recognized by the Trial Court, when he said (f. 112):

> *"The interest that every citizen may have at times in the faithful performance of duties of public employees or the fact that damage results to him from failure of such employee to fulfill carefully his duties does not create the right in third person to obtain the advantage of any contract, official or otherwise, to which he is not a party unless it be shown it was intended for his direct benefit."* (Italics supplied)

The word "all" does nothing more than refer to the duties of postmasters to the Government, and the mere fact that plaintiff and other mail patrons might be indirectly benefited thereby in no way affects the meaning of the language used so as to create in plaintiff a right to sue. That all duties are owing to the Government, rather than mail users, will hereinafter be discussed in this Brief.

Plaintiff Seeks Judicial Legislation.

As before shown, the language of the statute does not expressly, nor impliedly by legal intendment, confer on plaintiff the right to maintain this action. When plaintiff argues such right is conferred it is guilty of the very vice it accuses the surety of at page 43 of its Brief. It places a meaning and intention into the statute that the language itself does not permit and that Congress never intended. In effect it attempts to insert into the statute the misconceived notion that the statute itself creates direct duties to mail patrons, and that the word "all" in the bond statute should be so expanded to include them." To attempt to insert a meaning in a statute which is clearly not there nor intended, is an exemplication of judicial legislation in its most abhorrent sense.

The Fact that the Bond Is to Be Made to and With the United States Is An Important Factor in Determining Legal Intendment.

At page 43 plaintiff claims that the fact that the United States was the sole obligee named in the bond is not a controlling factor. Although this statement on its face appears correct, it must be remembered that the statute, as heretofore argued, provides that the bond be made "to and with the United States." This is not a case, such as the *Howard case* and other cases cited by plaintiff, where the bond statute itself either expressly or by implication confers coverage and the right to sue. The situation is quite to the contrary, since the postal statutes indicate no such right exists. Therefore, the fact that the statute and bond itself name the United States as the obligee is a factor

that may be considered as amplifying the intention expressed in the language of the statute. Although it in itself might not be the controlling factor, it is a factor which the court can and should consider.

The Bond Does Not Cover Both the Government and Mail Users.

Although the statute by its terms provides that the bond may be fixed "in such penalty as the postmaster general deems sufficient" this in itself does not permit the conclusion that the bond confers a right on plaintiff to sue thereon or brings plaintiff within its coverage.

The obvious purpose in not fixing a definite limit on postmasters' bonds by statute is at once apparent when one considers the vastness of the system. Post offices exist in every hamlet as well as the largest metropolis of the nation. Obviously, the Government's risk of loss of its property is, in a sense, dependent upon the amount of business transacted in different offices in different parts of the nation. A bond in a small amount might cover the risk in a small community, while a bond in an amount greatly disproportionate would be required in other communities. The evident intent of Congress in leaving to the discretion of the Postmaster General the amount of the bond to be exacted from a postal employee was occasioned by the thought that because of his experience and acquaintance with the postal system and its operation, he could more adequately ascertain the amount of the bond necessary for the Government's protection than could Congress.

It should also be noted that if a postmaster bond is to cover losses of mail patrons, and especially losses of con-

sequential nature, such as plaintiff seeks to recover in this case, no one could ever ascertain what would be adequate protection. Not even would the Postmaster General, who might in the case of Government losses be able to ascertain somewhat adequately the necessary amount of coverage, be able to determine a liability so indefinite. He would be in no better position than anyone else to determine what coverage would be adequate to cover that situation.

Appellant further argues at page 58 that even if the bond is for the primary benefit of the Government that does not exclude plaintiff as secondary beneficiary. Plaintiff here again falls into the same error as previously suggested; either the bond confers a right by necessary implication or it does not. As shown, no such right is conferred. The mere fact that plaintiff receives indirect benefits, and by virtue thereof classifies himself as a secondary beneficiary, cannot create in plaintiff a right to sue.

Departmental Regulations Confirm the Intendment Expressed in the Statute that Plaintiff Has No Right to Sue.

Sec. 816 of the Postal Laws and Regulations of 1932, provides for suits by the United States and distribution by officials of the Postal Department among persons damaged by "wrongful delivery of * * * mail." This section sets up elaborate machinery and defines the procedure to be taken by private mail users for a loss sustained through negligence of postal employees.

The foregoing regulation, therefore, confirms the intention expressed in the statute itself that no one other than the United States can maintain a suit on this bond contract.

The Spirit of the Law Negatives a Right to Sue in Plaintiff.

Plaintiff argues that the purpose of the postal system from which the public receives benefits indicates that the spirit of the law gives plaintiff a right to sue. The fact that mail patrons, or the public generally, are indirectly benefited, because of the postal system, does not necessarily compel the conclusion that Congress intended the bond of a postmaster for the protection of a private mail user. Likewise, the fact that the regulations and statutes prescribe certain rules relative to the delivery of mail does not necessarily compel the conclusion that those statutes create direct duties from the postmaster to the postal patrons, rather than direct duties from the postmaster to the Government.

The fallacy of plaintiff's reasoning as to the spirit of the law is manifest by reference to the following case cited by it at page 103 of its Brief.

> "In Public Clearing House v. Coyne, 194 U. S. 497, 506, this Court said:
>
> "*The Postal service is by no means an indispensable adjunct to a civil government*, and for hundreds, if not for thousands, of years, *the transmission of private letters* was either *intrusted to the hands of friends* or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times, and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high, and the methods of transmission so slow and uncertain, that it was not until 1845, when the post-

age was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

"*It is not*, however, *a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion*, **and the administration of public justice are**; but *is a public function, assumed and established by Congress* for the general welfare, and in most countries *its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue* to the government, and really operates as a popular and *efficient method of taxation*. Indeed, this seems to have been originally the purpose of Congress." (Italics and boldface supplied)

It will be observed from the language of this Court that the operation of the postal system is a proprietory rather than a governmental function. It is a function engaged in by the Government as a corporation running a business, rather than one that is a necessary part of civil government, such as the protection of life, liberty, property or *the administration of justice*. Correctly viewed, the Government role is in the nature of employer and the role of the postmaster is that of employee. The role of private persons in using the postal system is the same as the indirect benefit from any private business. Statutes passed by Congress and regulations imposed by the Department must be construed in the light of this fact. The proprietor and employer of any business may have rules and regulations relative to the transaction of said business which indirectly may benefit private persons. The fact that private persons may be indirectly benefited because of the im-

position of these duties by employer upon employee does not mean that those duties are duties owing to the private person upon which private rights can be founded. They are rather duties that the employee owes to the employer, and which the employer imposes in order to promote the efficient operation of his business. The United States Government, as proprietor of the postal business, in enacting the statutes and regulations imposing duties upon its employees, postmasters and other postal officials, throughout the country, of necessity, required these duties, even those relative to delivery of mails, in the same sense as any proprietor of any other business. It imposed them to promote the more efficient operation of its business and to increase its revenues, which this Court concluded "operates as a popular and efficient method of taxation." In short, the Government, as proprietor, imposed these duties on its employees for its own purpose to more efficiently operate its business, in the same way as an employee of a telegraph company may be required by his company and its rules and regulations, to promptly deliver telegraph messages. The duty is imposed by the Company for its own benefit, although the public indirectly benefits thereby. The employee owes the imposed duty to his employer not the public. Further, if a fidelity bond be required by the employer conditioned on the faithful performance by the employee of all the duties imposed by the rules and regulations of the company, this bond and the sureties thereon could only be sued by the employer for breach of that duty. Clearly, the person damaged because of misdelivery of a telegram could not sue the surety on such a bond. So, in this case, since the duties of Malone created by statute and the regulations are

duties owing to the Government rather than private persons, the bond does not cover any duties owing to private persons, since all the duties imposed are duties to the Government.

There is another fundamental principle which distinguishes the instant case from the *Howard case*. In the *Howard case* the Clerk of Court being an officer of a function of Government i. e. the administration of public justice, (which is a necessary part of Civil government in the same sense as the protection of life, liberty, and property) that function and his duties in that field are essentially governmental in nature rather than proprietary. Consequently, the duties imposed upon him by statute or regulations are direct duties that are owing to litigants in his court rather than the indirect benefits that a mail user might receive from patronage of the postal system.

Thus when we consider the essence and purpose of the postal system, in ascertaining the spirit of the law, its spirit leads us to the same conclusion as the letter of the law, namely, that plaintiff has no right to maintain this action on this bond.

Absence of Any Express Legislative Intent, or that Arising by Implication, and Absence of Consent of the United States Conferring a Right to Sue on the Bond, Precludes Plaintiff from Maintaining this Action.

In Washington vs. Young, supra, the City of Washington conducting a lottery employed a manager who had given a bond to the city. The suit was instituted in the name of the city for the benefit of the purchaser of a lottery ticket, with-

out the city's consent, on the grounds of the alleged breach of the bond by the manager of the lottery.

THE COURT HELD:

> "No person who is not proprietor of an obligation can have a legal right to put it in suit unless such right is given by the legislature and no person can be authorized to use the name of another, without his assent given in fact or by legal intendment * * * The proprietor of ticket 1037 has shown no right to sue on this bond * * * but, if they have, without authority, put this bond in suit the proper course is to turn them out of court, not to render a judgment which may bar any future suit brought by plaintiffs whose names they have improperly used."

In German Alliance Ins. Co. v. Home Water Supply Company, 226 U. S. 220 the defendant entered into a contract with the City to maintain and supply the city with suitable pipes and water works for fire purposes. Upon the failure of the City to sue, the Insurance Company brought action against the Water Company to recover damages sustained by reason of its payment of fire losses to buildings it insured, which resulted from the failure of the Water Company to fulfill its contract with the City. In sustaining a demurrer to the complaint, this Court said:

> "For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, *they may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names* * * *
> "The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen

has in the perfomance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action. "He is interested in the faithful performance of contracts of service by policemen, firemen, and *mail contractors*, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because *the carrier delayed in hauling the mail*, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire.

"Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone." (p. 230-231) (Italics supplied)

Idaho Gold Reduction Co. et al. vs. Croghan, et al., 6 Ida. 471, 56 Pac. 164 was an action on a postmaster's bond by a private person. The Court said:

"We know of no law authorizing the bringing of a suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

In Wile v. U. S. Fidelity & Guaranty Co., 6 Alaska 48, another case of a suit by a private person on a postmaster's bond, the Court said:

"I cannot see that any cause of action is stated in favor of Wile against the surety company. There is no privity of contract between them. The bond runs to

the United States of America, and by its terms is to protect the Government."

See also:

U. S. v. Griswold, 76 Pac. 596;
Robins v. Dry Dock and Repair Co. v. Flint et al., 275 U. S. 303;
Fosmire v. National Surety Company, 229 N. Y. 44, 127 N. E. 472;
Clark v. U. S., 60 Ga. 156;
U. S. v. U. S. Lines Co., 24 Fed. Supp. 427.

The rule in the foregoing cases, which were cases where no authorization to sue was given expressly or by legal implication, governs this situation, rather than the *Howard case*, where clearly such right was intended by the statute there construed when considered in the light of the purpose of its enactment.

II.

The Doctrine by Which the United States Sues as Bailee to Recover Loss Sustained by Private Persons, Together With the Postal Regulations, Provides the Exclusive Remedy for Losses Suffered by Private Persons.

The postal regulations and statutes prescribe in detail the procedure by which a mail patron is to recover damages for a loss sustained by him by reason of the acts of postmasters or postal employees.

This protection afforded the public was discussed by the trial court (80) as follows:

"It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on (fol. 103) postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. Provisions are made for registering and insuring mail matter. In Tit. 5 U. S. C. A. 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A. 215, and also found in Section 59 (2) of the Postal Laws and Regulations; the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. Section 816 of the Postal Laws and Regulations provides for suits by the United States and the distribution by appropriate administrative (fol. 104) officers of the Postoffice Department among persons damaged by loss, rifling, damage, wrongful delivery of, or depredations upon registered or other mail, and the failure to collect or remit C. O. D. funds.'"

These regulations have been in force and effect for many years. As stated in Helvering v. Winmill, 305 U. S. 82, 83

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended and substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

Accord: Brewster v. Gage, 280 U. S. 327.

So here the statutes together with the postal regulations are to be construed as having the effect of law. Where the regulations such as these cover the subject matter of the claim and provide a remedy, that remedy must be taken as the exclusive one. This Court so held in Globe Newspaper Company v. Walker, 210 U. S. 356, when it is stated:

> "A general liability created by statute without remedy may be enforced by an appropriate common law action, but where provision of liability is coupled with provision for a special remedy, that remedy, and that remedy only, must be employed."

The Trial Court was cognizant of this when it said:

> "It may be urged that the various administrative remedies afforded to patrons who may have sustained losses are not necessarily exclusive but are merely cumulative to the right of a private claimant to proceed against the bond. However, that argument might be persuasive if there existed any apparent intention manifested by Congress to provide direct bond protection for private patrons. The regulations and administrative remedies become significant, however, because they tend to support the position that, not only has the Postoffice Department, as well as Congress, assumed that no direct remedy was afforded a private

citizen under a postmaster's bond, at least without the obligee's consent, but it would appear that such remedies negative the implied intention which is the basis of this suit." (81-82).

The Rule that the Government, as a Bailee, Can Recover On Similar Bonds for Theft of Registered Letters and the Like, Is Not in Conflict With the Circuit Court's Opinion that Plaintiff Has No Right to Sue on the Bond.

Since the duties imposed, by statute and regulations, are direct duties owing from the postmaster, as employee, to the Government, as proprietor, it necessarily follows that an action commenced on the bond insuring performance of those duties, can be commenced only by the obligor, the Government, or proprietor. A private person, even though damnified as a result of a violation of those duties, cannot maintain an action on the contract insuring their performance merely because he is indirectly benefited. Nothing, of course, would preclude a private person receiving such indirect benefits from suing in tort at common law for his damages. He would be able to maintain his action, both against the employee as well as the proprietor, on the theory of respondeat superior. It must be recognized, however, that the Government cannot be sued in its sovereign capacity and is not liable under the doctrine of respondeat superior. The United States in operating its postal business, like the employer in any other private enterprise, is interested in protecting private persons from damage by reason of the acts of its employee. Although in such cases there is no *legal obligation* on the part of the Government, the Courts nevertheless (and rightly so) hold it has a *moral obligation* to collect damages for private mail users.

Thus the rule that where a mail user is damaged by acts of postal employes, the United States, being the only party who can maintain an action on the bond, may maintain it as bailee for the benefit of such private mail users and thus carry out its moral obligation to them above referred to. This reasoning is in no way in conflict with the decision of the Circuit Court of Appeals in this case but is in accord therewith.

See:

National Surety Company v. U. S. (8 Cir.) 129 F. 70;
U. S. v. American Surety Co. (C. C. Ill.) 155 F. 941;
U. S. v. American Surety Company (4 Cir.) 163 F. 228;
Gibson v. U. S. (1st Cir.) 208 F. 534;
U. S. Fidelity & Guaranty Co. vs. U. S. (9 Cir.) 246 F. 433.

IX.

THE QUESTION OF THE POSTMASTERS LIABILITY IN TORT IS NOT BEFORE THIS COURT.

As heretofore argued in this Brief, and as stated by the trial and Circuit Court of Appeals this action is on the contract, that is the bond, and not one in tort.

Under the heading "Nature of Action Involved" in this Brief, full discussion is had of the theory upon which this case was submitted in the trial court and also the Circuit Court of Appeals.

Thus when plaintiff asserts at page 79 of its Brief, "that postmasters are truly liable for their wrong is an old and well-established doctrine," that argument, of itself, is of no

significance or aid in the determination of the question before this Court. Never was the contention urged that postmasters are not liable in tort at common law for injuries sustained by private persons. That question is, however, a different question than the one here involved. The question here involved is, whether a private person may sue on a contract between the Government and the postmaster. Therefore, the cases cited by counsel in his Brief on this point are in no way helpful or determinative of the specific question before this Court.

The record does not establish that the postmaster was liable in tort to plaintiff as stated by him at page 77 of its Brief. Plaintiff on page 78 of its Brief states that the postmaster's Answer did not deny that his acts did not make him liable to plaintiff. This is not true as shown by the following portion of the Answer:

III.

"Defendant, Malone, further specifically denies that the injuries and other damages set forth in the complaint, was caused by any breach of duty or trust on the part of said defendant, Malone, or any wilful, negligent, or unlawful acts of said defendant, Malone, as set forth in said complaint, but alleges in truth and in fact, that any damages that may have been sustained by said plaintiff, were due wholly and solely, to the criminal acts of said Hunting as set forth in said complaint, and that said damage was proximately caused by the acts of said Hunting, and in no way caused by any neglect of duty, wilful, wrongful, or negligent acts on the part of said defendant, Malone." (33).

Further, the mail matter involved in this case was delivered pursuant to paragraph 2 of Section 777, which states that the postmaster may deliver mail matter to the person claiming the addressee has verbally given him authority to receive it unless he doubts the authority, in which case he may require written authority from the addressee.

The Circuit Court of Appeals by the following language inferentially recognized that the postmaster, in the absence of doubt, might properly deliver mail matter on oral authority:

> "If it be assumed that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressee before delivering the letters in accordance with the provisions of Section 777 of the Postal Regulations it does not follow that appellant is entitled to maintain the action." (104).

Furthermore that Court recognized that the record did not indicate Malone was guilty of tort, by stating, "If it be assumed."

This was one of the questions raised throughout the trial and preserved by the Motions for Directed Verdict (61-63).

Further Judge Nordbye's opinion and decision indicates that no question was considered save and except the question of the coverage of the bond and of plaintiff's right to sue thereon. The trial Court said:

> "The Court is of the opinion, that if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion (fol. 133) becomes unnecessary in view of the conclusions indicated" (87).

In addition to the foregoing, various references are made in Judge Nordbye's order to other provisions of the postal laws and regulations, and companion statutes (f. 102-103). The verdict of the jury, having been set aside by the judgment, is not before this Court. Therefore plaintiff's claim that the record shows the defendant Malone is liable in tort is manifestly erroneous, and more than that discusses a question not before this Court.

The mere fact that the court dismissed as to the defendant Malone on the grounds that in the absence of the defendant Surety necessary diversity of citizenship would be lacking, in no way grounds the conclusion that defendant Malone was liable in tort. With the defendant Surety Company out of the case, it readily appears that the suit resolved itself into a suit between the Midland Loan Finance Company and Malone, both of whom are citizens of the State of Minnesota. The Court could dismiss the action as to Malone on the grounds of lack of the requisite diversity of citizenship, as well as any other grounds. The mere fact that the Court ascribed this reason for dismissing the action does not mean that he could not have also ascribed other grounds.

CONCLUSION.

This case is of great importance not only to Malone but to every postal employe in the service of the nation.

In operating the postal system the government is functioning in its proprietary capacity. In the beginning the postal system was of small proportion, but through the years has developed into a tremendous business extending to and beyond the boundaries of the nation. To efficiently

operate this far-flung business, Congress has passed necessary statutes and the postoffice department has adopted necessary regulations, all designated to effect that purpose. Both the statutes and the regulations provide for the giving of bonds by postmasters and other postal employees to protect the United States, their employer, against a breach of the regulations governing their conduct and operations as employees of the vast postal system. In this case Malone, like every other employee of the far-flung postal system, sought to perform the duties imposed upon him by those regulations in accordance with their provisions. Those regulations and the statutes complementing them direct him in the conduct of his duties. He has no election as to the mode of their performance save and except the limited discretion conferred upon him by the regulations in certain specified instances. In this case Section 777 of the Postal Regulations, particularly paragraph 2 thereof, authorized him to exercise his judgment in determining whether delivery of the mail matter here involved could be made to Hunting. By that very regulation the United States as his employer authorized and sanctioned such delivery. Surely where, as here, he acted honestly in exercising that judgment, he should not be criticized for the results of his so doing, much less be subjected to the annoyance, expense and imputation of dishonesty resulting from an action such as this.

Furthermore the subsequent official action of the United States as his employer in elevating him to the position of postmaster, after full investigation of the claims and criticisms of plaintiff, show not only full authorization for and sanction of his conduct in delivering the mail matter to Hunting under the circumstances disclosed by the record,

but such promotion is a positive acknowledgment by the United States that Malone in so delivering the mail matter here involved properly performed the duties of his office as acting postmaster. The situation is simply one where Malone, the postal employee, has fully performed the duties of his office as required by the statutes of the United States and the regulations of the postoffice department, and his superiors have found him guilty of no misconduct justifying or permitting any claim to be made on his official bond as acting postmaster.

Disregarding all this, plaintiff claims the right to maintain an action on the bond of Malone as acting postmaster. The action so asserted is not one sounding in tort nor upon tort, nor is it grounded on any violation of any common law right, nor upon any showing of misconduct by Malone in the performance of his official duties. The sole basis of the asserted right of recovery is a contract which by its own language and the language of all related statutes and departmental regulations, expressly negatives any such right to sue or any interest of the plaintiff therein.

The action asserted is peculiar in another sense: it seeks not the recovery of the value of the mail matter allegedly misdelivered, but rather consequential damages arising from such alleged misdelivery. The damages so asserted arose not from the act of misdelivery but were directly occasioned by the forgeries of Hunting and were suffered before any use was made of the mails by plaintiff in the particular transaction. The claim is made that if Malone had not delivered to Hunting the mail matter involved plaintiff would have sooner discovered Hunting's forgeries and thereby possibly prevented later loss. This theory ignores

Malone's ignorance of the content or purpose of the mail matter allegedly misdelivered to Hunting; it purposely ignores the authority for Malone to deliver such mail matter to Hunting (paragraph 2, Section 777, Postal Laws and Regulations).

Stripped of all verbiage, plaintiff's contention is that it, as a private mail user of the postal system, (although only incidentally and minutely benefited thereby) can maintain this action so as to have the conduct of Malone as a postal employee of the United States tested by a court and jury even though the United States, by Malone's superiors in the postoffice department, has fully examined into his conduct and has ratified it as proper and in conformity with the Postal Laws and Regulations. This contention places not only Malone but every employee of the postal system in the position of serving two masters and requires that they follow two standards of conduct which at times might be (and in this case are) opposite and utterly inconsistent: one, that prescribed by the United States, his employer; the other, that dictated by courts and juries at the instance of a private mail user. Surely no such anomalous situation was ever contemplated by Congress, the postoffice department or the officials in charge of the postal system. The chaotic results that would flow from that situation and the inconceivable position in which every postal employee would thus be placed needs no further comment.

It is most significant that throughout plaintiff's brief, its counsel leans heavily on the Postal Laws and Regulations in measuring or grounding its asserted right of action, but when it comes to being itself bound by the terms and provisions of the Postal Laws and Regulations it ignores them

completely and claims it has no coexisting duty or obligation to look to them for its recovery or relief in the situation complained of. Particularly is this true of Section 816 of the Postal Laws and Regulations.

Respectfully submitted,

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